Master Brisbane ak Itang v Robinson Lee (c/o Sekolah Kebangsaan (Cina) Sungai Menyan) & Ors

HIGH COURT (KUCHING) — SUIT NO 22–119 OF 2010-II
STEPHEN CHUNG J
18 SEPTEMBER 2012

Tort — Damages — Negligence — Claim for general and special damages — Plaintiff attended boarding school and had fever — Plaintiff taken to clinic and subsequently sent home — Plaintiff diagnosed with Japanese Encephalitis ('JE') virus and suffered brain damage — Physically and mentally disabled — Whether plaintiff became infected when he was in school or at home — Pig farm near school — Whether school teachers and authorities under common law and/or statutory obligation to immunise or prevent plaintiff from virus — Whether there any contract between parties — Whether it necessary to sue public servant or officer responsible for tort for governments to be vicariously liable

The plaintiff, a minor, sued the defendants through his father. The plaintiff had fever while attending boarding school and was subsequently taken by his teacher ('the first defendant') to the clinic and was then sent back home in the *kampung*. His conditions deteriorated and he was diagnosed to have been infected with the Japanese Encephalitis ('JE') virus. As a result of the infection, the plaintiff suffered brain damage, became wheelchair bound and was unable to take care of himself. The plaintiff became permanently disabled both physically and mentally and required lifetime care. In the present claim, the plaintiff sued the first to sixth defendants for general and special damages based on contract, torts and a common law fiduciary duty of care. The plaintiff contended that a pig farm should never be located within a 2km radius of a school as pigs were the natural hosts of the JE virus which was transmitted to human beings via the culex mosquitoes from infected pigs. Therefore, it was contended that the relevant authorities knew of the high risks involved, should have put in place appropriate public health policies and ensure their effective implementations to protect members of the public including giving vaccination against the JE virus to the plaintiff and other children in the school. The plaintiff submitted that the defendants had common law and/or statutory duties towards the plaintiff who was placed at the boarding school. The defendants denied the plaintiff's claims and submitted that the plaintiff failed to prove that he was bitten by a culex mosquito and was infected by the JE virus at the boarding school. They contended that although he became sick at the school, the plaintiff had gone back to his *kampung* for the weekend. It was argued that wading birds including ducks were also natural hosts of the JE virus and that there were ducks kept in the *kampung* and he could have been infected

by the JE virus while he was there. They contended that although the school was situated near to the pig farm, the risks of JE infection were minimal because, except for the plaintiff, there was no and had not been any JE infection at the school and or in the district for more than ten years. The defendants contended that there was no duty or obligation on their part to ensure that the plaintiff was specifically immunised against the JE virus because that duty was on the plaintiff's parents to send him for the necessary vaccinations. The issues that arose for determination by the court were: whether the plaintiff was infected with the JE virus at the school or while he was at home in the *kampung*; whether the defendants were under any common law and/or statutory duties or were negligent and had breached their duties in failing to immunise or to prevent the plaintiff from being infected with the JE virus at the school; whether there was any contract between the plaintiff and any of the defendants; and whether it was necessary to sue the public servant or officer responsible for the tort for the government to be vicariously liable.

Held, dismissing the claims:

(1) Pigs and certain birds were the hosts of the JE virus and they act as a natural reservoir for which the JE virus multiplies. Transmission of the virus to humans was via the culex mosquitoes which was the vector for the JE virus. The incubation period is from four to fourteen days for a person to develop symptoms, usually fever, after he has been bitten by an infected culex mosquito. The evidence showed that the plaintiff came down with fever on 25 September 2006 and based on the incubation period of between four to 14 days, the plaintiff could have been infected with the virus on or before the 22 September 2006 either in the *kampung* or at the school (see paras 12–14).

(2) There was no provision in this Act to provide for any mandatory or compulsory or forced immunisation of any person or class of persons against an infectious disease or to relocate or close any premises as a preventive measure, in particular if there was no declaration of an infected local area. There was no evidence that, prior to the plaintiff being infected, an authorised officer had reason to believe that there had been a person with an infectious disease on any premises near to the school or in the school or that there existed on any such premises any conditions likely to lead to an outbreak or spread of the JE virus and that the authorities had then failed to do anything about it. The evidence showed that at the material times, the plaintiff was the only person at the school who was infected with the JE virus. No other student was infected as such (see paras 26–27).

(3) The first and second defendants, as teachers, were employed by the Ministry of Education to teach or to provide education to the students at the school. Any duty of care they had to the students of the school

including the plaintiff was to ensure a clean, safe and conducive environment for them to study and to stay at the school, it being a boarding school. There was no evidence that they did not do so. There was no evidence that the school was not clean or was dirty or was a breeding ground for mosquitoes giving rise to the spread of the JE virus or other insect-borne diseases. The first and second defendants were not medically qualified and not trained and expected to treat the plaintiff for his fever or to know that he had been infected with the JE virus. They were not directed and they did not receive any directive to bring the students at the school including the plaintiff to be vaccinated against the JE virus (see paras 37–38).

(4) There was no sufficient evidence before the court that the defendants were negligent or careless in the implementation of the JE immunisation program. Even for other immunisation or vaccination programmes such as for measles, chicken pox or polio, parents were advised to have their children vaccinated, they were not forced to do so (see para 40).

(5) The plaintiff was infected with the JE virus after he was bitten by a mosquito. This was not due to the exercise of the defendants' statutory powers or the failure to excise any such powers. It was also not due to the negligence of the defendants or any of them in the manner the program was implemented but to the forces of nature which the defendants, in particular the Ministry of Health, were trying to prevent or control. The defendants could not be held liable to the plaintiff for the JE infection. Otherwise, the defendants or any of them would also become liable to anyone who was infected by any of the mosquito-borne diseases such as malaria or dengue fever (see para 41).

(6) There was no contractual liability on the first, second and third defendants to ensure that the plaintiff would not be infected with the JE virus at the school or to inform the parents of the plaintiff about the risks of JE infection at the school or of the needs to have the plaintiff to be vaccinated against the JE virus. It was not contemplated and there was no contractual duty on the first, second and or third defendants to ensure that the plaintiff was vaccinated against the JE virus. The responsibility to vaccinate the plaintiff came under the purview of the Ministry of Health. There was no duty imposed on the first, second and or third defendants to vaccinate or to bring the plaintiff to be vaccinated or to arrange for personnel from the Ministry of Health to go to the school to vaccinate the plaintiff against the JE virus (see para 47).

(7) In this case, it fell upon the Ministry of Health to implement the JE immunisation program. There was no evidence that a particular officer had been specifically assigned to vaccinate the plaintiff and he failed to do so and was negligent in doing so. On the facts and circumstances of this case, it would be almost impossible to identify or name an officer who

was responsible to but failed to vaccinate the plaintiff against the JE virus because there was no such officer. Therefore, it was sufficient, and it was just and reasonable, to name and join the Director of the Ministry of Health as a party in this suit in order to make the sixth defendant vicariously liable to the plaintiff (see para 54).

[Bahasa Malaysia summary

Plaintif, seorang yang belum dewasa, mengambil tindakan melalui bapanya. Plaintif telah jatuh demam ketika berada di sekolah asrama dan seterusnya dibawa ke klinik oleh gurunya ('defendan pertama') dan kemudian dihantar pulang ke rumah di kampung. Keadaannya bertambah teruk dan dia disahkan dijangkiti virus Japanese Encephalitis ('JE'). Akibat jangkitan tersebut, plaintif mengalami kerosakan pada otak, menjadi lumpuh dan tidak boleh menjaga dirinya sendiri. Plaintif menjadi tidak berupaya sepenuhnya dari segi fizikal dan mental dan memerlukan penjagaan sepanjang hidup. Dalam tuntutan ini, plaintif mengambil tindakan terhadap defendan pertama hingga keenam bagi ganti rugi am dan khas berdasarkan kontrak, tort dan kewajipan berhati-hati fidusiari di bawah common law. Plaintif menghujahkan bahawa sebuah ladang khinzir tidak patut berada dalam radius 2km daripada sekolah kerana khinzir adalah hos semulajadi virus JE yang disebarkan kepada manusia melalui nyamuk-nyamuk *culex* daripada khinzir-khinzir yang dijangkiti. Dengan itu, dihujahkan bahawa pihak berkuasa relevan yang mengetahui mengenai risiko tinggi terbabit, sepatutnya telah menyediakan polisi-polisi kesihatan awam yang bersesuaian dan memastikan implementasi efektif untuk melindungi masyarakat termasuk memberi vaksinasi kepada plaintif dan kanak-kanak lain di sekolah. Plaintif menghujahkan bahawa defendan-defendan mempunyai kewajipan common law dan/atau statutori terhadap plaintif yang ditempatkan di sekolah asrama. Defendan-defendan menafikan tuntutan-tuntutan plaintif dan menghujahkan bahawa plaintif gagal membuktikan bahawa dia digigit nyamuk *culex* dan dijangkiti virus JE di sekolah asrama. Mereka menghujahkan bahawa walaupun dia jatuh sakit di sekolah, plaintif telah pulang ke kampungnya pada hujung minggu. Dihujahkan bahawa burung-burung termasuk itik-itik adalah hos-hos semulajadi virus JE dan terdapat itik-itik yang dipelihara di kampung dan dia mungkin dijangkiti virus JE ketika berada di sana. Mereka menghujahkan bahawa walaupun sekolah tersebut terletak berdekatan ladang khinzir, risiko jangkitan JE adalah minima kerana, kecuali plaintif, tiada dan tidak pernah ada jangkitan JE di sekolah atau daerah tersebut selama lebih daripada sepuluh tahun. Defendan-defendan menghujahkan bahawa tiada kewajipan atau obligasi pada pihak mereka untuk memastikan plaintif secara khususnya diimunisasi terhadap virus JE kerana kewajipan tersebut terletak pada ibu bapa plaintif untuk menghantarnya bagi mendapatkan vaksinasi-vaksinasi yang sepatutnya. Isu-isu yang timbul untuk diputuskan oleh mahkamah adalah: sama ada plaintif dijangkiti virus JE di sekolah atau semasa dia berada di rumah di kampung; sama ada defendan-defendan di bawah kewajipan common law dan/atau statutori atau

cuai dan telah melanggari kewajipan-kewajipan mereka dalam gagal untuk mengimunisasi atau mengelakkan plaintif daripada dijangkiti virus JE di sekolah; sama ada terdapat kontrak antara plaintif dan mana-mana defendan; dan sama ada perlu untuk mengambil tindakan terhadap penjawat awam atau pegawai yang bertanggungjawab bagi tort agar kerajaan boleh dikatakan bertanggungan secara vikarius.

Diputuskan, menolak tuntutan-tuntutan:

(1) Khinzir-khinzir dan sesetengah burung adalah hos kepada virus JE dan kedua-duanya bertindak sebagai tempat semulajadi untuk virus JE membiak. Penyebaran virus kepada manusia adalah melalui nyamuk-nyamuk *culex* yang merupakan vektor bagi virus JE. Tempoh inkubasi adalah empat hingga 14 hari bagi seseorang untuk mengalami simptom-simptom, kebiasaannya demam, selepas dia digigit oleh nyamuk culex yang dijangkiti. Keterangan menunjukkan bahawa plaintif demam pada 25 September 2006 dan berdasarkan tempoh inkubasi antara empat hingga 14 hari, plaintif mungkin telah dijangkiti virus pada atau sebelum 22 September 2006 sama ada di kampung atau di sekolah (lihat perenggan 12–14).

(2) Tiada peruntukan dalam Akta ini yang memberikan imunisasi mandatori, wajib atau paksaan ke atas seseorang atau sekumpulan orang-orang bagi penyakit-penyakit berjangkit atau menempatkan semula atau menutup mana-mana premis sebagai langkah berjaga-jaga, khasnya yang mana tidak terdapat deklarasi satu kawasan tempatan yang dijangkiti. Tiada keterangan bahawa, sebelum plaintif dijangkiti, seorang pegawai berkuasa mempunyai sebab untuk percaya bahawa terdapat orang dengan penyakit berjangkit di mana-mana premis berdekatan sekolah atau dalam sekolah atau bahawa wujud dalam premis sedemikian, sebarang keadaan yang berkemungkinan membawa kepada wabak atau penyebaran virus JE dan bahawa pihak berkuasa gagal berbuat apa-apa mengenainya. Keterangan menunjukkan bahawa pada masa material, plaintif seorang sahaja di sekolah tersebut yang dijangkiti virus JE. Tiada pelajar lain yang dijangkiti sepertinya (lihat perenggan 26–27)

(3) Defendan kedua dan ketiga, sebagai guru, telah diambil berkerja oleh Kementerian Pelajaran untuk mengajar atau memberi pendidikan kepada pelajar-pelajar di sekolah. Sebarang kewajipan berhati-hati yang mereka ada terhadap pelajar-pelajar sekolah tersebut termasuklah plaintif, adalah untuk memastikan persekitaran yang bersih, selamat dan kondusif untuk mereka belajar dan tinggal di sekolah tersebut, sebagai sebuah sekolah asrama. Tiada bukti bahawa mereka tidak berbuat sedemikian. Tiada keterangan juga bahawa sekolah tersebut tidak bersih atau kotor atau menjadi tapak pembiakan nyamuk-nyamuk,

menyebabkan penyebaran virus JE atau penyakit-penyakit yang dibawa serangga. Defendan pertama dan kedua tidak mempunyai kelayakan perubatan dan tidak dilatih atau dijangka untuk merawat plaintif bagi demamnya atau mengetahui bahawa dia telah dijangkiti dengan virus JE. Mereka tidak diarahkan dan tidak mendapat sebarang arahan untuk membawa pelajar-pelajar di sekolah termasuk plaintif untuk divaksinasikan bagi virus JE (lihat perenggan 37–38).

(4) Tidak terdapat keterangan yang mencukupi di hadapan mahkamah bahawa defendan-defendan cuai atau tidak berhati-hati dalam implementasi program imunisasi JE. Sekalipun bagi program-program imunisasi atau vaksinasi lain seperti campak, cacar air atau polio, ibu bapa dinasihatkan memvaksin anak-anak mereka, mereka tidak dipaksa berbuat sedemikian (lihat perenggan 40).

(5) Plaintif dijangkiti dengan virus JE selepas dia digigit oleh seekor nyamuk. Ini bukan kerana pelaksanaan kuasa statutori defendan-defendan atau kegagalan untuk mengeksaiskan kuasa demikian. Ia juga bukan atas kecuaian defendan-defendan atau mana-mana antara mereka dalam implementasi program tetapi kuasa semulajadi yang mana defendan-defendan, khasnya Kementerian Kesihatan, cuba untuk dielak atau di kawal. Defendan-defendan tidak boleh diputuskan bertanggungan kepada plaintif bagi jangkitan JE. Jika tidak, defendan-defendan atau mana-mana antara mereka akan menjadi bertanggungan kepada sesiapa yang dijangkiti oleh mana penyakit yang dibawa oleh nyamuk seperti malaria dan demam denggi (lihat perenggan 41).

(6) Tiada liabiliti kontraktual pada defendan pertama, kedua dan ketiga untuk memastikan bahawa plaintif tidak akan dijangkiti oleh virus JE di sekolah atau memaklumkan kepada ibu bapa plaintif mengenai risiko-risiko jangkitan JE di sekolah atau keperluan untuk memvaksin plaintif bagi virus JE. Ia tidak dirancang dan tiada kewajipan kontraktual ke atas defendan pertama, kedua dan ketiga untuk memastikan bahawa plaintif divaksin bagi virus JE. Tanggungjawab memvaksin plaintif berada di bawah bidang kuasa Kementerian Kesihatan. Tiada kewajipan yang dikenakan ke atas defendan pertama, kedua dan ketiga untuk memvaksin atau membawa plaintif agar divaksinkan atau menguruskan agar kakitangan Kementerian Kesihatan ke sekolah untuk memberi vaksin kepada plaintif bagi virus JE (lihat perenggan 47).

(7) Dalam kes ini, terletak pada Kementerian Kesihatan untuk implementasi program imunisasi JE. Tiada keterangan bahawa seorang pegawai telah secara khususnya diarahkan untuk memvaksin plaintif dan bahawa dia gagal dan cuai berbuat sedemikian. Berdasarkan fakta dan hal keadaan kes ini, adalah hampir tidak mungkin untuk mengenal pasti atau menamakan seorang pegawai yang bertanggungjawab tetapi gagal

memvaksin plaintif bagi virus JE kerana tidak wujud pegawai tersebut. Oleh itu, adalah mencukupi dan adalah adil dan munasabah, untuk menamakan dan memasukkan Pengarah Kementerian Kesihatan sebagai pihak dalam guaman ini untuk menjadikan defendan keenam sebagai bertanggungan secara vikarius kepada plaintif (lihat perenggan 54).]

Notes

For cases on negligence, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 274–281.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

East Suffolk Rivers Catchment Board v Kent [1940] 4 All ER 527, HL (refd)

Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103, FC (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (distd)

Pengarah Hospital Selayang & Ors v Ahmad Azizi bin Abdullah James & Ors [2012] 5 MLJ 679, CA (refd)

Stovin v Wise [1996] AC 923, HL (refd)

Wu Siew Ying t/a Fuh Lian Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1; [2011] 1 CLJ 409, FC (refd)

X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and another appeal [1995] 3 All ER 353, HL (refd)

Legislation referred to

Animals Act 1953 ss 36(8), 78

Destruction of Disease-Bearing Insects Act 1975 s 18

Prevention and Control of Infectious Diseases Act 1988 ss 4(1), 11(1), (2), (3), 18

Shankar Ram (Francis Teron and Daniel Lim with him) (Thomas, Shankar Ram & Co) for the plaintiff.

Mohd Taufik (Senior Federal Counsel, Attorney General's Chambers) for the first, second, third, fourth and sixth defendants.

Joseph Chioh Hock Hua (Senior State Counsel, State Attorney General's Chambers) for the fifth defendant.

Stephen Chung J:

[1] The plaintiff is a minor and sues by his next best friend who is his father. At the material times the plaintiff was about ten years old and lived with his parents, grandmother and siblings at Kampong Danau Melikin, Balai Ringin,

Serian District. He attended Sekolah Kebangsaan (Cina) Sungai Menyan, Serian, a primary and boarding school, which was situated near to a pig farm. The plaintiff pleaded that he was a fee paying student of the boarding school.

[2] It was pleaded that on 25 September 2006 or 26 September 2006, the plaintiff had fever while he was at the school. On 27 September 2006, he was taken by his teacher ('the first defendant') to the government clinic in Balai Ringin for treatment and was then sent back to his house in the kampong. His conditions deteriorated and on 28 September 2006 his mother sent him to the Serian Hospital where he was admitted. He was transferred to the Sarawak General Hospital ('SGH') in Kuching where he was diagnosed to have been infected with the Japanese Encephalitis ('JE') virus. As a result of the infection, the plaintiff suffered brain damage, is confined to a wheel-chair and is unable to take care of himself. Dr Hii King Ching ('PW3'), a paediatrician at SGH, testified that the plaintiff is permanently disabled both physically and mentally and requires lifetime care. The plaintiff has sued the first to the sixth defendants for general and special damages based on contract, torts and a common law fiduciary duty of care.

[3] The plaintiff contended that pigs are the natural hosts of the JE virus which is transmitted to human beings via the culex mosquitoes from infected pigs. The plaintiff contended that a pig farm should never be located within a 2km radius of a school due to the high risks of infections, especially to children under 15 years old. It was contended that there are many pig farms in Serian District which has a history of JE infections. The plaintiff pleaded that there was a major outbreak of the virus in Malaysia in early 1999 including in Serian.

[4] Therefore it was contended that the relevant authorities knew of the high risks involved, should have put in place appropriate public health policies and ensure their effective implementations to protect members of the public including giving vaccination against the JE virus to the plaintiff and other children in the school. It was also contended that the defendants have common law and or statutory duties towards the plaintiff who was placed at the boarding school. It was contended that the defendants have failed to do so and were also negligent in failing to do so.

[5] The defendants denied the plaintiff's claims and submitted that the plaintiff has failed to prove that he was bitten by a culex mosquito and was infected by the JE virus at the boarding school. They contended that although he became sick at the school, the plaintiff had gone back to his kampong for the weekend and returned to the school on 24 September 2006. It was contended that wading birds including ducks are also natural hosts of the JE virus and that there were ducks kept in the kampong and he could have been infected by the JE virus while he was there.

[6] They contended that although the school was situated near to the pig farm, the risks of JE infection were minimal because, except for the plaintiff, there was no and has not been any JE infection at the school and or in Serian District for more than ten years. The defendants contended that there was no duty or obligation on their part to ensure that the plaintiff was specifically immunised against the JE virus because that duty was on the plaintiff's parents to send him for the necessary vaccinations.

[7] The first issue for trial is whether the plaintiff was infected with the JE virus at the school or while he was at home in the kampong. The evidence showed that on Friday, 22 September 2006, after school, the plaintiff went home to his kampong for the weekend. On Sunday morning, 24 September 2006, his mother sent him back to the school and then sent his father to Kuching Airport because his father was travelling to Kuala Lumpur where he was then working as a driver.

[8] Based on the statement of the warden at the boarding school (which was tendered as exh D8), the plaintiff came down with fever on the night of 25 September 2006. On 26 September 2006, DW3, who was a teacher assistant at the school, was informed by the warden that the plaintiff had fever. DW3 brought the plaintiff to the first aid or sick room, gave him a Panadol and asked him to go and rest. On 27 September 2006 at about 9am, the warden informed the first defendant about the plaintiff's fever and he told the warden to inform the plaintiff to get his things ready to go to the clinic. The first defendant sought permission from the second defendant, who was the principal of the school, to send the plaintiff to the clinic. The first defendant together with DW3 took the plaintiff to the government clinic at Balai Ringin for treatment. The plaintiff was prescribed some Panadol and cough syrup for his fever. The plaintiff was then sent back to his house in the kampong. His grandmother was at home but his mother was then working in the farm.

[9] There were some contentions on his conditions at the time and whether the plaintiff asked to be sent home or whether the teachers decided to send him home. The first defendant testified that it was the school's standard practice that when a student became sick, the school would send the student to the government clinic for treatment and then informed the parents to bring the student home, if the parents could be contacted by phone. He said if the parents could not be contacted by phone, the school would send the student home if the house could be reached by road. He said that in this case, after they had taken the plaintiff to the clinic, they sent him home. Apparently they could not contact his parents to bring him home.

[10] When his mother came back from the farm, she found the plaintiff very sick and lying on the floor. She looked for transport to send him to the Serian

District Hospital where he was admitted for treatment on 28 September 2006. He was suspected to be suffering from meningitis. His conditions worsened and on 30 September 2006 he was transferred to SGH where he was diagnosed to have been infected with the JE virus.

[11] The plaintiff subpoenaed three witnesses (PW1, PW7 and PW9) who were experts in their respective field of expertise ie in paediatric infectious diseases, in virology and in public health and who have written on the JE virus. They gave evidence on the causes, transmissions and the prevention of the JE virus in Malaysia. In their testimonies they have also referred to a *Surat Pekeliling Jabatan Kerajaan Tempatan* JKT:JM/T/BIL2/99 dated 29 January 1999 ('SAG 1') issued by the Jabatan Kerajaan Tempatan, Kuala Lumpur, a *Garis panduan Program Immunisasi Japanese Encephalitis* (exh P3) issued by the Ministry of Health, a *pekeliling* dated 10 May 2001 to implement the JE immunisation programme in Malaysia (exh P2) issued by the Ministry of Health, a directive dated 16 August 2001 on the implementation of the JE immunisation programme in Sarawak signed by PW9 issued by the Jabatan Kesihatan Negeri, Sarawak (exh P25) and a press statement made by the Director-General of Health, Malaysia on 23 March 1999 (exh P4) on the JE virus.

[12] Based on their evidence and the *garis panduan*, circulars and or directives referred to during the trial, it is not in dispute that pigs and certain birds are the hosts of the JE virus and they act as a natural reservoir for which the JE virus multiplies. Transmission of the virus to humans is via the culex mosquitoes which is the vector for the JE virus. The incubation period is from 4–14 days for a person to develop symptoms, usually fever, after he has been bitten by an infected culex mosquito. The preventive measures include fogging, keeping the surrounding areas free from mosquitoes and immunisation programmes for those in the high risks groups ie for pig farm workers and children below 15 years of age.

[13] The evidence showed that the plaintiff came down with fever on 25 September 2006 and based on the incubation period of between 4–14 days, the plaintiff could have been infected with the virus on or before the 22 September 2006 either in the kampong or at the school. The defendants suggested that some villagers reared pigs, chicken and ducks in the kampong and it was put to the *ketua kampong* ('PW10') and the plaintiff's father ('PW13') that the plaintiff was bitten by a mosquito which was infected with the JE virus from an infected pig, duck or an infected bird at the kampong. Both PW10 and PW13 denied these. PW10 said that the villagers did not keep any pig or any poultry in the kampong.

[14] There was no evidence that pigs and or ducks were reared or kept in the

kampong. The defendants did not present any evidence that pigs and or ducks were kept in the *kampong* or that there was any infected bird at the *kampong* and which could be the source of the plaintiff's infection. On the other hand, the evidence showed that the school was situated near to the pig farm and in this case, within 2km of the pig farm.

[15] It was almost impossible for the plaintiff to prove or for the defendants to disprove that the plaintiff was bitten by a culex mosquito infected with the JE virus at the school because there was no record or no evidence of when or where he was bitten or were infected by such a mosquito. However, based on the evidence of PW1, PW7 and PW9 on the length of the incubation period and that pigs are the natural reservoir of the JE virus, the risks of infection being transmitted via the culex mosquitoes to human beings near to the pig farm are rather high and always present. On the evidence before the court, and on a balance of probabilities, the plaintiff was probably infected with the JE virus at the school.

[16] The next issue for trial is whether the defendants were under any common law and or statutory duties or were negligent and had breached their duties in failing to immunise or to prevent the plaintiff from being infected with the JE virus at the school. It was the plaintiff's case that the school was under the responsibility of the Ministry of Education and that the Ministry of Health was responsible to prevent and control the outbreak of diseases including JE in Malaysia. It was submitted that due to the outbreak of the JE virus in Malaysia including in the Serian District of Sarawak in 1999, the Ministry of Health had issued the directives, protocols and guidelines for the control and prevention of the disease including providing for the immunization of children below the age of 15 years, immunisation of pig farm workers and the relocation of pig farms from residential areas.

[17] The evidence showed that there was an outbreak of the JE virus in the country in 1998 to early 1999 resulting in 13 deaths. As a result, the above *garis panduan*, directives and press statement were issued which set out the causes, transmissions and the preventive measures being taken to prevent the spread of the JE infection in Malaysia. The *garis panduan* and the press statement, inter alia, provided that Priority I of the immunisation programme was to immunise pig farm workers and those who stayed on pig farms and Priority II of the programme was to immunise children between 1–15 years old who lived within 2km from pig farms. In Sarawak, the JE immunisation programme was to commence in January, 2002 for children from 1–15 years old (see exh P25).

[18] It was submitted that the first defendant being a teacher and the second defendant being the principal of the school stood in a position as fiduciaries to the plaintiff who was a minor. Since the school was situated near to the pig

farm, it was submitted that the first and second defendants were under a duty to ensure the well being, safety and health of the plaintiff at the school and that the surroundings of the school were clean and safe. It was submitted that all the defendants, either jointly or by each of them or vicariously, had a duty to comply with the directives, protocols and guidelines of the Ministry of Health to ensure that the students in the school including the plaintiff were immunised against the JE virus, that the pig farm workers were immunised against the JE virus and to take steps to eliminate the breeding places of culex mosquitoes within a 2km radius of the school. It was submitted that the fifth defendant through its ministries, municipalities, district offices and its servants and agents must relocate the pig farm away from the school. The allegations in particular were that the defendants failed to vaccinate the plaintiff against the JE virus and failed to relocate or continue to permit the pig farm to operate near to the school. It was submitted that the defendants' failures or omissions were in breach of their common law and or statutory duties and were negligent in doing so.

[19] It was the contention of the plaintiff, on the evidence of PW1, PW7, and PW9, that it was mandatory to comply with the *garis panduan* and or directives to carry out the immunisation programme, in particular to vaccinate children under 15 years old, including the plaintiff, at the school who were living within 2km of the pig farm. It was submitted that the school and or the first and second defendants and or the Ministry of Education and or the Ministry of Health were responsible to ensure that the students at the school including the plaintiff were vaccinated under the programme, that they were under a duty to do so and that they had failed to do so.

[20] It was the plaintiff's case that pursuant to the *garis panduan* and or directives the school or Ministries should bring the students to be vaccinated or to arrange for the health personnel to go to the school to vaccinate the students under the JE immunisation programme as they were aware of the high risks of infections to the students. It was submitted that due to their failures and or omissions, they were liable to the plaintiff, the Government of Malaysia being vicariously liable.

[21] In *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and another appeal* [1995] 3 All ER 353, the House of Lords stated that private law claims against public authorities for damages could be classified into four categories: (a) actions for breach of statutory duty irrespective of carelessness; (b) actions based solely on the careless performance of a statutory duty in the absence of any common law right of action; (c) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; (d) misfeasance in public

office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct was unlawful. On the pleadings, the plaintiff's case was not based on the fourth category.

[22] It was also held in that case that in an action for breach of a statutory duty irrespective of carelessness, ie simpliciter, a breach of statutory duty is not by itself sufficient to give rise to any private law action. A private law cause of action only arises if it can be shown as a matter of construction of the statute that the statutory duty is imposed for the protection of a limited class of the public and that Parliament intends to confer on members of that class a private right of action for breach of the duty. The mere assertion of the careless exercise of a statutory duty is not sufficient in itself to give rise to a private law cause of action. The plaintiff also has to show that the circumstances are such as to raise a duty of care at common law.

[23] In determining whether such a duty of care is owed by a public authority, the manner in which a statutory discretion is or is not exercised has to be distinguished from the manner in which the statutory duty is implemented in practice. Since it is for the authority, not for the courts, to exercise a statutory discretion conferred on it by Parliament, nothing the authority does within the ambit of the discretion can be actionable at common law. There is no common law duty of care in relation to the taking of decisions involving policy matters since the courts cannot adjudicate on policy matters. Therefore, a claim alleging negligence in the exercise of a statutory discretion involving policy considerations will fail as being non-justiciable: see *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and another appeal* [1995] 3 All ER 353

[24] The Prevention and Control of Infectious Diseases Act 1988 ('PCIDA') is a legislation relating to the prevention and control of infectious diseases in Malaysia. It includes provisions for the prevention of importation of infectious diseases from outside the country and the requirement on doctors and others to notify of any infectious disease upon becoming aware of the existence of such a disease. Section 11(1) states that if the Minister is satisfied that there is an outbreak of an infectious disease in any area in Malaysia or that any area is threatened with an epidemic of any infectious disease, he may by an order in the *Gazette* declare such area to be an infected local area and s 11(2) then provides that he may prescribe the measures to be taken to control or prevent the spread of the infectious disease within or from the infected local area including for an authorised officer to direct any person or class or category of persons living in an infected local area to subject himself or themselves to treatment or immunisation (s 11(3)).

[25] Section 18 provides that if an authorised officer has reason to believe that there has been a person with an infectious disease on any premises or that there exists on any premises any conditions likely to lead to an outbreak or spread of any infectious disease, he may examine the person or premises or disinfect or close the premises to prevent the outbreak or spread of any infectious disease.

[26] There is no provision in this Act to provide for any mandatory or compulsory or forced immunisation of any person or class of persons against an infectious disease or to relocate or close any premises as a preventive measure, in particular if there is no declaration of an infected local area.

[27] In this case, the Minister did not declare Balai Ringin or Serian District to be an infected local area in 2001 or from 2002–2006. There was no evidence that, prior to the plaintiff being infected, an authorised officer had reason to believe that there had been a person with an infectious disease on any premises near to the school or in the school or that there existed on any such premises any conditions likely to lead to an out break or spread of the JE virus and that the authorities had then failed to do anything about it. The evidence showed that at the material times the plaintiff was the only person at the school who was infected with the JE virus. No other student was infected as such.

[28] The Destruction of Disease-Bearing Insects Act 1975 ('DDBIA') is a legislation providing for the destruction and control of disease-bearing insects and for the medical examination and treatment of persons suffering from insect-borne diseases. The Act provides for the director general or a medical officer or public health inspector to require in writing an owner or occupier of any premises, where it appears that the premises are likely to propagate or harbour any disease-bearing insects, to take specified measures to destroy the disease-bearing insects. It also provides that a medical officer may examine and or treat any person suspected or likely to be infected with any insect-borne disease. There is no provision in the Act to provide for any mandatory or compulsory or forced immunisation of any person or class of persons against an infectious disease or mandatory relocation or closure of any premises as a preventive measure against any infectious disease. Similarly, there are no such provisions in the Animals Act 1953.

[29] The parties did not refer to any legislation which imposed a statutory duty on the Ministry of Education or Ministry of Health to go out to schools to vaccinate students against the JE virus. Reading the above three legislations, they are of general applications and the statutory duties are not imposed on the public authorities for the protection of a limited class of the public nor did Parliament intend to confer on members of a certain class any private right of action for breach of the duties against the public authorities. In fact, under

s 4(1) of the PCIDA, s 18 of the DDBIA and ss 36(8) and 78 of the Animals Act, no liability shall attach nor any compensation shall be payable for any action taken under these legislations. These specific provisions were held to offer absolute protection to the public authorities: see *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663.

[30] Further, the above legislations did not impose any statutory duties on the public authorities, in this case the Ministry of Education and or the Ministry of Health, to go to the school and to immunise the students of the school including the plaintiff against the JE virus. There was also no statutory duty imposed on the Ministry of Education and or the Ministry of Health to relocate or to close the pig farm situated near to the school on the facts and circumstances of this case. It has been held that the absence of a statutory duty will normally exclude the existence of a common law duty of care: *Stovin v Wise* [1996] AC 923.

[31] If there was any duty imposed on any public authority to relocate or to close the pig farm as the plaintiff contended, it would be on the Ministry of Local Governments or the Veterinary Department. However, they are not sued and are not parties to this action.

[32] The *garis panduan* and or directives were issued by the Ministry of Health and or the Ministry of Local Governments as part of a series of measures which included fogging and the JE immunisation programme taken by the government to control and prevent the spread of the JE virus in Malaysia. These were the policy decisions of the two Ministries and the JE immunisation programme was to be implemented by the Health Ministry.

[33] Under the *garis panduan* and or directives, the responsibility was not on the Ministry of Education to immunise children below 15 years of age in the school. It was not in the garispanduan and or directives that the Ministry of Education or the school were responsible to immunise the children at the school and or must arrange for the health personnel to go to the school to immunise the children. The *garis panduan* and or directives were not addressed or copied to the Ministry of Education and or to the school. Similarly, there was no order or instruction in the *garis panduan* and or directives for the Ministry of Health to go out to the school to immunise the children.

[34] Under the *garis panduan* and or directives, priority under the JE immunisation programme was to be given firstly to pig farm workers and those who lived on pig farms and secondly to children below 15 years old who lived within 2km of a pig farm. These were the recommendations of the Ministry of Health and referred to the eligibility of those in the priority or high risks group to be immunised under the programme. Both PW1 and PW9 had similarly

testified as such, that pig farm workers and children below 15 years old who lived within 2km of a pig farm were eligible and to be given priority to be vaccinated under the programme.

[35] The Ministry of Health could not force those within the priority groups to be immunised unless they posed an immediate threat to others or if a state of emergency has been declared. Some people, although within the high risks groups, may decline to be vaccinated on religious or other grounds. Since there is no provision or statutory duty in the PCIDA or DDBIA or Animals Act imposed on the Ministry of Health or Ministry of Education to vaccinate the students at the school and or pig farm workers, there was no such duty imposed on them under the *garis panduan* and or directives. Those within these priority groups who were eligible should present themselves at government clinics or hospitals to be vaccinated under the programme.

[36] Did the failure by the defendants and or any of them to vaccinate the plaintiff at the school amount to negligence or did the failure to implement the garispanduan and or directives amounted to negligence resulting in the plaintiff sustaining the damage? Or was there any negligence in the manner in which the statutory duty was implemented in practice? In a negligence claim, there must be a link between the wrongdoing and the damage caused: see *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585, *Wu Siew Ying t/a Fuh Lian Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1; [2011] 1 CLJ 409. It has been held that where a statutory authority is entrusted with a power, they cannot be made liable for any damage sustained by a member of the public by reason of the failure to exercise that power. If, in the exercise of their discretion, they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damage which he would have suffered had they done nothing: *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527.

[37] In this case, the first and second defendants were teachers at the school. They were employed by the Ministry of Education to teach or to provide education to the students at the school. Any duty of care they had to the students of the school including the plaintiff was to ensure a clean, safe and conducive environment for them to study and to stay at the school, it being a boarding school. There was no evidence that they did not do so. There was no evidence that the school was not clean or was dirty or was a breeding ground for mosquitoes giving rise to the spread of the JE virus or other insect-borne diseases.

[38] The first and second defendants were not medically qualified and not trained as such. They were not expected to treat the plaintiff for his fever or to

know that he had been infected with the JE virus. They were not directed and they did not receive any directive to bring the students at the school including the plaintiff to be vaccinated against the JE virus. Even when the plaintiff was admitted to the Serian District Hospital, he was wrongly diagnosed to have meningitis. Only a qualified and trained person with the proper diagnostic tools is in a position to take specimen and carry out the tests to determine the infection affecting plaintiff.

[39] The evidence showed that the warden found out the plaintiff had fever on the night of 25 September 2006 when she was doing her rounds at the boarding school. She referred the plaintiff to DW3 the next day who interviewed him and gave him a Panadol and told him to go and rest. When his fever did not improve or go away the following day, she told the first defendant who together with DW3 took him to the government clinic at Balai Ringin for treatment. The first and second defendants said that according to their standard procedure, when a student became sick they would take the student to the clinic for treatment and ask the parents to take the student home and if the parents could not be contacted by phone, they would send the student home. Even if they did not send him home but kept him at the boarding school, they could not do anything more for him after they took him to the clinic for the treatment of his fever. As teachers at the school, they had done everything they could for the plaintiff in the circumstances of this case when he came down with fever at the school: see *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103.

[40] PW1 had testified that the JE immunisation programme was a very vast programme and the Ministry of Health alone could not carry it out. He said that to implement the programme fully and successfully required the cooperation of other departments and agencies. He said that there was no official document to show that the government had achieved a more than 90% coverage for the JE programme which was in contrast to the other vaccination programmes which achieved more than 90% or 100% coverage. PW9 had testified that there were shortcomings in the implementation of the JE immunisation programme because of the shortage of the vaccines at the times and the shortage of funds. These again illustrated decisions involving policy matters. There was not sufficient evidence before the court that the defendants were negligent or careless in the implementation of the JE immunisation programme. Even for other immunisation or vaccination programmes such as for measles, chicken pox or polio, parents are advised to have their children vaccinated, they are not forced to do so.

[41] In this case the plaintiff was infected with the JE virus after he was bitten by a mosquito. This was not due to the exercise of the defendants' statutory powers or the failure to excise any such powers. It was also not due to the

negligence of the defendants or any of them in the manner the programme was implemented but to the forces of nature which the defendants, in particular the Ministry of Health, were trying to prevent or control: see *East Suffolk Rivers Catchment Board v Kent*. The defendants could not be held liable to the plaintiff for the JE infection otherwise the defendants or any of them would also become liable to anyone who is infected by any of the mosquito-borne diseases such as malaria or dengue fever. Based on the above authorities referred to, the defendants were not liable for the plaintiff's JE infection.

[42] Was there any contract between the plaintiff and any of the defendants? In Particular 1 of para 1 of the re-amended statement of claim, the plaintiff pleaded that he was a fee paying student at the boarding school and in para 11 thereof, he pleaded that there was a contract express or implied in existence with the first, second, third, fifth and sixth defendants. The plaintiff then set out the express or implied terms of the contract in para 11 of the re-amended statement of claim and he has also set out the particulars of breach of the contract in para 12 thereof. Was there any contract between the plaintiff and or his parents with the said defendants?

[43] His father (PW13) testified that he paid RM127 per year to the boarding school and he also paid RM10 per month to the school for computer classes for the plaintiff. He was cross-examined and said that he did not have any receipt for the payments made. He said he asked but the school did not give him any receipt although the school promised to do so. It was then put to PW13 that there was no contract between him and the school and he agreed.

[44] In para 2 of the amended defence of the first, second, third, fourth and sixth defendants, they admitted Particular 1 of para 1 of the re-amended statement of claim except for the fact that the first and second defendants were the agents and or servants of the fifth defendant ie they have admitted that the plaintiff was a fee paying student of the boarding school. However, they then in para 17 of their amended defence denied paras 9–12 of the re-amended statement of claim.

[45] Assuming that there was a contract because they paid the fees to the school, there was no written contract as such which set out the terms and conditions of this contract. The plaintiff has set out the express or implied terms of the contract in para 11 of the re-amended statement of claim. In this case, the first and second defendants, and in extension the Ministry of Education, were contractually responsible to ensure that the school was a clean and safe environment for the plaintiff to study and live in.

[46] As stated earlier there was no evidence that the school was not clean or was dirty or was a breeding ground for mosquitoes which gave rise to the spread

of the JE virus. There was no evidence that at the material times the plaintiff, his parents together with the first and or second defendants knew or were aware of the risks of JE infection at the school or that the risks were foreseeable at the material times. There was no evidence that such risks were within the contemplation of the plaintiff, his parents and or the 1st and second defendants when they entered into the contract for the plaintiff to study and stay at the boarding school and when they paid the fees.

[47] Therefore, on the facts of the case, there was no contractual liability on the first, second and third defendants to ensure that the plaintiff would not be infected with the JE virus at the school or to inform the parents of the plaintiff about the risks of JE infection at the school or of the needs to have the plaintiff to be vaccinated against the JE virus. It was not contemplated and there was no contractual duty on the first, second and or third defendants to ensure that the plaintiff was vaccinated against the JE virus. The facts showed that there was no contract between the plaintiff and the fourth, fifth and sixth defendants.

[48] It was also contended that the local authorities, and by extension the fifth defendant, should not have approved the pig farm to be situated so near to the school and should have relocated the pig farm away from the school. Any such approval or extension of the license to the pig farm and any relocation of the pig farm would be under the local authorities and or the veterinary department. However, they have not been sued and are not parties to this suit. The first, second, third, and fourth defendants were not responsible for the licensing and or relocation of the pig farm.

[49] Last but not least, is the issue of the vicarious liability of the fifth and sixth defendants respectively in tort ie whether it is necessary to sue the public servant or officer responsible for the tort for the governments to be vicariously liable. In this case the tort complained of was the failure to vaccinate the plaintiff against the JE virus.

[50] The defendants submitted that it was necessary to identify and name the particular officer or officers whom the plaintiff alleged had committed the negligence before the federal or state government could become vicariously liable. It was submitted that if the officer or officers were not liable then the government was also not liable and that this is the concept of vicarious liability under common law. The plaintiff submitted that it was not necessary to name the officer, it was sufficient to name the Director of the Ministry of Health as the head of the Ministry or Department responsible for the implementation of the JE immunisation programme to attach vicarious liability on the sixth defendant.

[51] The question is not whether it is necessary to identify and name the

officer responsible for the negligence, rather the question is whether the officer responsible for the negligence is sued as a party to the action before the government can be liable for the negligence. I find support in the decision of the Federal Court in the case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* as follows:

> Therefore, on the proper construction of ss 5-6 of Act 359, in any claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability be established before the government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the government.

[52] As I have ruled above, the responsibility to vaccinate the plaintiff came under the purview of the Ministry of Health. There was no duty imposed on the first, second and or third defendants to vaccinate or to bring the plaintiff to be vaccinated or to arrange for personnel from the Ministry of Health to go to the school to vaccinate the plaintiff against the JE virus.

[53] On the facts, the case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* can be distinguished because in that case only the governments were sued without any of the officers responsible for the negligence being made a party to the suit. In this case, the Director of the Ministry of Health has been made a party. The question is whether it is sufficient to do so.

[54] In this case it fell upon the Ministry of Health to implement the JE immunisation programme. There was no evidence that a particular officer had been specifically assigned to vaccinate the plaintiff and he failed to do so and was negligent in doing so. On the facts and circumstances of this case, it would be almost impossible to identify or name an officer who was responsible to but failed to vaccinate the plaintiff against the JE virus because there was no such officer. Therefore, it is sufficient, and it is just and reasonable, to name and join the Director of the Ministry of Health as a party in this suit in order to make the 6th defendant vicariously liable to the plaintiff: see *Pengarah Hospital Selayang & Ors v Ahmad Azizi bin Abdullah James & Ors* [2012] 5 MLJ 679 (Rayuan Sivil No CV-01-IM)-388 Tahun 2011.

[55] Based on P25, the plaintiff alleged that in Sarawak the JE immunisation programme was to be implemented by the Sarawak Health Department and that it had failed to do so. In the event that it is necessary to name and join this officer as a party to action, then PW9 as the Director of the Sarawak Health Department should be joined as a party to this action. However, the plaintiff has not sued PW9 or the Director of the Sarawak Health Department as a party in this action. At the material times PW9, who was the Director of Health in

Sarawak, was an officer of the sixth defendant and not of the fifth defendant. Therefore, the action against the fifth defendant is not sustainable and must be dismissed.

[56] Similarly, as stated above, the plaintiff has complained that the fifth defendant through its district councils or local authorities or municipalities or agents failed to relocate the pig farm or was negligent in permitting the pig farm to be situated near to the school. Similarly, the plaintiff has failed to sue either the district council or local authorities or municipalities or agents which were alleged to be negligent as a party in this action. Therefore, again, the action against the fifth defendant is not sustainable and must be dismissed.

[57] For the reasons given, the plaintiffs' claims against the first, second, third, fourth, fifth and sixth defendants are dismissed.

Claims dismissed.

Reported by Afiq Mohamad Noor